vIN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 35 OF 2022

EAST AFRICA DEVELOPMENT BANK..... PLAINTIFF

Versus

CLOTHILDA MONA PUNDUGU ..... DEFENDANT

Last order: 26th September, 2022
Date of Ruling: 26th October, 2022

RULING

NANGELA, J:.

What purpose does the law of limitation serve and does it apply to a continuing contract of guarantee? This Ruling arises from a preliminary objection raised by the Defendant, Ms. Clothilda Mona Pundugu, and it addresses, among other things, the question raised hereabove.

The Defendant herein objects to the hearing and determination of this suit wherein the Plaintiff is praying for judgment and decree as follows:

(a) Payment of **USD 1,102,244.17** being the amount defaulted by the company as per paragraphs 9, 10, 11 and 12 of the Plaint;

(b) Interest on (a) above at the rate of 18% from the date of demand notice to the date of final judgment and decree and interest on the decretal amount on the Court rate, from the date of judgment to the final settlement of the decree.

(c) General Damages, costs and any other reliefs as the Court may be pleased to grant.

Before going to the roots of the objection, let me set out some facts about this suit, albeit in brief.

It all started on the 27th August 2004 and 28th November, 2005, when the Plaintiff entered into a Lease Agreement with a company in the name of PANACHE LTD (herein after referred to as the Company) for purchase of 16 units of 20 feet Tread Steer Bogie Container Wagons Model EAO1/02 and 12 units of 40 feet Tread Steer Bogie Container Wagons Model EAO1/Mrk3.

Such respective containers (equipment) were to be leased to the said company at an agreed leasing sum of USD 400,000/ and USD 801,530.10 respectively, and an additional USD 38,460.00. In particular, the parties agreed that, the lease

amount was to be made payable within 60 months from delivery date at a rate of USD 6500/- per month and USD 17,698 *per mensam*.

On the basis of the agreement, the Plaintiff is said to have purchased and delivered the said equipment in the year 2004 and 2005. It has been averred, however, that, clause 4.1 (g) of both lease agreements obliged the company to issue a personal guarantee of its directors to secure the payment of the lease amount upon default by the company and demand notice thereof.

In view of that, it has been alleged that, on or about the 8th day of September, 2004, the Defendant executed a continuing guarantee Agreement in conformity with the terms and conditions of the lease agreement. It has been further alleged that, by that guarantee agreement, the Defendant unconditionally, absolutely and irrevocably guaranteed due and prompt payment of rental deposits, interest, commissions and all other payments that would be made payable to the Plaintiff upon default by the Company and on demand by the Plaintiff.

Unfortunately, until the time of expiry of the agreements in 2009 and 2010, both the Company and Defendant failed to

perform as per the agreements as there were several defaults despite there being several reminders and final demand notice for USD 1,202,244.17. This amount is now being claimed through this legal process, and the Defendant is being sued in her capacity as guarantor.

The Defendant filed her defense and, as I stated earlier herein above, she raised a preliminary objection which is to the effect that:

> "The suit is hopelessly statutory barred for being filed out of time in violation of Section 3 and part 1 item 7 of the schedule of the Law of Limitation Act Cap 89 R.E 2019."

In this suit, the Plaintiff enjoys the services of Mr. Gabriel Mnyele, learned advocate while Mr. Jovinson Kagirwa, also a learned advocate, represents the Defendant. When the parties appeared before this Court on the 06th day of September 2022, this Court directed them to dispose of the said preliminary objection by way of written submission. A schedule of filing of their respective submission was issued, and they all complied with it, hence, this ruling.

In his submission, Mr. Jovinson Kagirwa, the Defendant counsel contended that, on the basis of the plaint filed in this Court, it was clear that, the associated Lease Agreements, which were entered in the year 2004 and 2005 respectively, were supposed to come to an end in February 2013.

According to Mr. Kagirwa, and in reference to paragraphs 2, 3, 4, 6 and 9 of the Plaint, since this suit is based on breach of contract, the same is time barred for having been filed after the expiration of 6 years from the date when the cause of action occurred. It was his contention that, according to section 5 of the Law of Limitation Act, Cap 89 R.E 2019, the law is very categorical that, a right of action accrues on the date on which the cause of action arises.

To buttress his submission, Mr. Kagirwa relied on the decision of this Court (Hon. Kakolaki, J.) in the case of **Felician B. Itemba vs. The Board of Trustees of ELCT -Eastern and Costal Diocese**, Civil Case No.21 of 2022 where the Court was of the view that, the central point in determining an objection based on lapse of time as in this suit, is whether the suit by the Plaintiff was indeed preferred outside the prescribed time limit

as per Schedule I item 6 of the Law of Limitation Act, Cap.89 R.E 2019.

As for Mr. Kagirwa's understanding, in this present suit, the time when the cause of action arose, should be gauged by what section 6 (a) of the Law of Limitation Act, Cap.89 R.E 2019 provides, i.e., that:

> "In the case of suit for an account, the right of action shall be deemed to have accrued on the date on which the last transaction relating to the matter in respect of which the account is claimed took place."

Mr. Kagirwa contended that, the dispute in this Commercial Case No. 35 of 2022, was based on unpaid monies which, according to him, was due and payable by the Defendant to the Plaintiff as of 19th February 2013. He contended, that, on the basis of the averments in paragraph 3 of the Plaint, the cause of action was that, the Defendant and the Company breached the terms and condition of lease agreements from February 2013.

Mr. Kagirwa maintained that, nowhere has it been said that either the Company or the Defendant paid any sum in the lease account after February 2013, meaning that, the breach is not

even a continuing breach able to create a fresh period of Limitation from 2013.

According to Mr. Kagirwa, the 13th day of February 2013, which is a date relied upon by the Plaintiff was just a date of reply letter but the real fact was that the cause of action accrued even much earlier.

In view of the above, it was Mr. Kagirwa's insistence that, section 3 of Law of Limitation Act, Cap.89 R.E 2019, imposes a mandatory requirement that, all proceeding described in the first schedule to the Act which are instituted after the period of limitation prescribed shall be dismissed, whether the Defendant has raised a preliminary objection as a defense or not.

Mr. Kagirwa was of the view that, since the Plaint was filed and paid for on the 04th of April 2022, which is ten years from the date when the cause of action accrued, and given that there is no extension warranting the Plaint to be filed out of time, the suit should be dismissed with costs. He so insisted and prayed.

Responding to Mr. Kagirwa's submission in chief, the Plaintiff's learned Advocate Mr. Gabriel Mnyele, submitted that, the learned Defendant's counsel has failed to state for sure when the cause of action arose. Referring to section 5 of Law of

Limitation Act, Cap.89 R.E 2019, Mr. Mnyele submitted that, time starts to run against a person upon accrual of a cause of action. He contended that, the Defendant's failure to exactly state the time when such cause of action accrued, was fatal.

Mr. Mnyele submitted further that; the other wrong premise on the part of Mr. Kagirwa's argument is that, the current suit is based on section 6 (a) of the Law of Limitation Act. He contended, however, that, that approach was an incorrect one, because the present suit was covered under item 7 of part 1 of the first schedule that is: "**Suits based on contract not otherwise provided for."** He contended, therefore, that, the question of when the last transaction was done, does not arise.

To support his submission, he relied on the decision of this Court in the case of **Ali Shabani & 48 others vs. Tanzania National Road Agency & another** Civil Appeal No. 261/2020 and that of **Moto Matiko Mabanga vs. Ophir Energy PLC** Civil Appeal No. 119/2021 (both unreported).

Deriving his argument from the legal position held in the above cited cases, Mr. Mnyele was of the view that, in determining the preliminary point of objection raised by the

Defendant, one has to refer to the pleadings and should not merely base a conclusion on an abstract material.

Mr. Mnyele submitted that, as a matter of fact, the present suit is against the guarantor and the contract of guarantee was annexed to the plaint as Annexure **EADB-5**. He contended that; the guarantor had guaranteed to pay the Plaintiff the sum payable under the lease upon default by the Leasee.

According to Mr. Mnyele, as per Clause 2.03 of Annexure **EADB-5**, the guarantee executed, was a continuing one and, that, in line with Clause 2.01 of the same Annexure **EADB-5**, the Defendant's liability was to arise upon demand by the Plaintiff directed to the Defendant guarantor.

As such, he submitted, that, in compliance thereof, the Plaintiff issued a demand notice to the Guarantor on the 19th of February 2013 (as per **Annexure EADB-9**) which was responded to by the Defendant via **Annexure EADB-10** to the effect that the Company was still committed to pay. In Mr. Mnyele's view, the implication of **Annex.EADB-10** is that, the guarantor has not refused to pay the bank.

Mr. Mnyele submitted that, in law, a cause of action arises/accrues when a demand for payment of a particular sum

is met by a refusal or where a part to a contract commits a fundamental breach of contract.

He contended that; although the Plaintiff has been unable to get hold of a local authority in support of when a cause of action arises against an issuer of a continuing guarantee, however, solace can be found in the Indian case of **Margaret Lalita Samuel vs. Indo Commercial Bank Ltd** (http//Indianlaws/doc/136751411), where the Indian Supreme Court observed as follows:

> "The guarantee is seen to be continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of general balance of its account or any other account whatsoever. In a case of such continuing guarantee, so long as the account is alive account, in sense that, it is not settled, and **there is no refusal** on the part of the guarantor to carry out the obligation we do not see how the

period or limitation could be said
to have commenced accruing."
(Emphasis added by Mr. Mnyele).

Mr. Mnyele was of the view that, the above dictum fits squarely to the situation at hand, as there is no refusal on the party of Guarantor Defendant, and meaning, therefore the cause of action has not yet arisen, he so argued. He surmised, therefore, that, there is no basis to argue or hold that the current suit is time barred. He urged this Court to be persuaded and adopt the Indian position and overrule the preliminary objection.

A brief rejoinder submission was filed by Mr. Kagirwa. In his rejoinder, he reiterated his earlier submission in chief underscoring that, the suit is time barred. Mr. Kagirwa rejoined further that, even if one was to agrees that the suit falls under part 1 item 7 of the Law of Limitation Act, still the period of limitation in respect of the claims preferred is 6years.

Mr. Kagirwa distinguished the Indian case of **Margaret Lalita** (supra) which was relied upon by Mr. Mnyele. He contended, in the first place, that, the cited case does not fall within the law of guarantee in Tanzania, as in our law, the liability of the Guarantor and that of the Principal are co-extensive. He

contended that, there is no distinction be it a continuing guarantee or not as the contract of guarantee does not provide otherwise.

Secondly, it was Mr. Kagirwa's rejoinder submission that, as per the case relied upon, for the liability of the guarantor to be extinguished from that of the Principal Debtor, that will depend on the terms and condition of the Deed of guarantee. He contended that, page 2 of the cases attached to the Plaintiff's submission states that, the extent of liability under guarantee and when the guarantor's liability will arise, are matters dependent purely on the terms of the contract itself.

He submitted, therefore, that; the Plaintiff's counsel has not been able to state categorically where the Deed of Guarantee states that the period of limitation should be reckoned from the date of demand. Mr. Kagirwa rejoined further that; the letter (**Annex.EADB-10**) which is relied upon by the Plaintiff, was issued by the Principal Debtor and not the Guarantor (Defendant).

According to him, even if it was issued by the guarantor, does it mean that, there would be no limitation of time to the claims? Mr. Kagirwa submitted that, the judgment of the case

relied upon by Mr. Mnyele was not even attached for this Court's reference and, thus, Mr. Mnyele's account cannot be relied upon. As such, he urged this court to dismiss the suit.

I have objectively considered the rival submissions of the learned counsel for both parties. The issue which I am confronted with is whether the suit filed by the plaintiff is preferred outside the prescribed time limit. There are, however, other collateral issues which I will need to look at, one being when a period of limitation accrue in a contract of guarantee as against the guarantor.

Essentially, the law of limitation of actions is a law which serves a purpose and which absolves a Court from the risks of entertaining a matter which is already overtaken by time or rather a "stale" matter. I am as well mindful of what Mr Justice Lightman says in Oughton, D. *et al*, **Limitation of Actions**, (1998) regarding the law of limitation, that, it:

> "reflects a compromise between what is and what is not excusable delay and an excusable reason for delay in commencing proceedings."

I am, as well, mindful of what the Court of Appeal stated in the cases of **Ali Shabani & 48 others vs. Tanzania National Road Agency & another** Civil Appeal No. 261/2020 and that of **Moto Matiko Mabanga vs. Ophir Energy PLC** Civil Appeal No. 119/2021 (both unreported), on the need to scrutinize the pleadings and annexures to the Plaint when one seeks to determine an objection.

Besides, it is also worth noting, as one of the cardinal principles in the law of guarantees, that, the liability of a surety under a guarantee is a matter of construction or interpretation of the guarantee in question. Since the liability of the surety arises and is dealt with *strictissimi juris*, the contract of guarantee is to be strictly construed in favour of the surety. In addition, in a guarantee, the surety is liable only if the principal debtor is liable and fails to pay; if the principal debtor is not liable, neither will the surety be.

With those basic underlying points at hand, in an attempt to respond to the main issue pointed out herein, therefore, one has to establish, in the first place, when exactly the action accrued and what are its implications. Doing so, however, is not an easy task in the circumstance of this suit unless one

establishes the nature and effect of the contract of guarantee between the Plaintiff and the Defendant.

According to Mr. Mnyele's submission, the claim at hand is based on a contract of guarantee and, that, the guarantee is a continuing guarantee, hence, not affected by limitation of time. Essentially, whether a particular guarantee is a continuing guarantee or not, could be carved out from the terms of the guarantee itself and the intention of the parties derived from the said terms.

In this suit at hand, there is no dispute that, there were Lease Agreements signed and guaranteed by the Defendant which were for a duration was for 60 months and upon payment of agreed monthly rentals equal to US$ 6,500 consecutively for all agreed 60 months. There is also no dispute that, the lease was guaranteed by personal guarantee of one Director, the Defendant herein, who, as per **Annexure EADB-5**, undertook to make good any default under the lease agreement.

It is also not disputed, as I read from the submissions and the pleadings, that, the last demand notice (**Annexure EAB-9**) dated 19th February 2013, was brought to the attention of the Defendant and, that, this suit was filed in this Court against the

Guarantor on the 04th of April 2022, almost 9 years and two months down the line. The crux of the matter at hand, however, is whether by instituting this suit after the lapse of such a long period, the suit is time barred.

Under such a circumstance, one may also raise further questions which crave for responses as well. These are such as follows: firstly, can the Plaintiff still claim from the Guarantor even after the lapse of nine solid years (plus) from the last time when the Plaintiff issued a demand notice to the Defendant Guarantor? Secondly, are there no time limit governing claims based on contract of guarantee including continuing guarantee? These questions are pertinent to the objection raised in this suit and need to be responded to as well.

In our law, a contract of guarantee is defined under section 78 of the Law of Contract Act, Cap.345 R.E 2019. The said provision states as follows:

> A "contract of guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his default and the person who gives the guarantee is called the "surety";

> the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and guarantee may be either oral or written."

Generally, such a contract of guarantee may be "specific", which means it is given for a specific transaction or a "continuing", which means it is guarantee given for more than a single transaction.

One notable aspect of a continuing guarantee is its applicability to a series and multitudes of separate, and distinct transactions. Sections 81 of the Law of Contract Act, Cap.345 R.E 2019 provides for a definition of what a continuing guarantee means and, sections 82 and 83 of the Act, provides for instances of its revocation. On the one hand, section 81 provides that:

> "A guarantee which **extends to a series of transactions** is called a "continuing guarantee."

On the other, sections 82 and 83 provides as follows:

> Section 82. A continuing guarantee may **at any time be**

revoked by the surety, as to future transactions, by notice to the creditor".

Section 83. The death of the surety operates, in **the** absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions."

In his submission Mr. Mnyele has urged this Court to be guided by the dictum in the case of **Margaret Lalita** (supra). Although Mr. Kagirwa seems to contend that, that case is distinguishable, I do not think so. In my view, it stands to be one of very persuasive cases to me, taking into account the kind of relationship which our Law of Contract Act, Cap. 345 R.E 2019 shares with the Indian Contract Act, 1872.

In the said case of **Margaret Lalita** (supra) the Court was of the view that:

"The present suit is in substance and truth one to enforce the guarantee bond executed by the defendant. In order to ascertain the nature of the liability of the

defendant it is necessary to refer to the precise terms of the guarantee bond… The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the period of limitation does not commence running. …"

The Court went ahead and agreed with the trial judge that,

"Limitation would only run from the date of breach and the **cause of action** arises **when the contract of continuing guarantee is broken**, and in the present case we are of the view

> that **so long as the account remained a live account**, and there was **no refusal on the part of defendant to carry out her obligation**, the period of limitation did not commence to run." (Emphasis added).

From the above excerpts obtained from the **Margaret Lalita's case** (supra) two conditions need to be established or fulfilled for the sake of establishing whether limitation has begun to operate in case of a continuing guarantee or not. These are: **firstly**, whether the facility account was a live account, and; **secondly**, whether there was repudiation or refusal to pay the amount due under the guarantee.

As I stated earlier, whether a particular guarantee is a continuing guarantee or not, could be carved out from the terms of the guarantee itself and the intention of the parties derived from the said terms. In this present suit, clause 2.03 of the contract of guarantee signed by the parties herein is the one which indicates the nature of the guarantee. The Clause provides as here under, that:

> "The guarantee shall be a continuing guarantee and **shall remain in full** force **and effect until all payments due** from the Company to EADB in connection with the Lease Facility **have been fully paid** in accordance with the provisions of the Lease Agreement. Accordingly, the obligations of the Guarantor hereunder shall not be discharged except by performance and then only to the extent of such performance." (Emphasis added).

Clause 2.01 of the said Contract of Guarantee is also instructive. It provides as follows:

> "Save as hereunder provided, the Guarantor irrevocably, absolutely and unconditionally guarantees as primary obligor and not merely as surety, the due and punctual payment of the Rentals, deposit, interest, commission, premium, and all other payments in

> connection with the Lease Facility as the same shall become due and payable by the Company to EADB under the terms of the Lease Agreement, **upon default and receipt by the Guarantor of EADB's Demand**." (Emphasis added).

Looking at the above, there is no doubt that, the guarantee was a continuing guarantee. In the Indian Supreme Court case of **Syndicate Bank vs. Channaveerappa Beleri and Others**, AIR 2006 SC 1874, the Court was of the view, and held that:

> "A guarantor's liability depends upon the terms of his contract. A **'continuing guarantee'** is different from an ordinary guarantee. There is also a difference between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of

guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same extent as that of the principal debtor. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. **A claim may be even time-barred against the principal debtor, but still enforceable against the guarantor**. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question **as to when the liability of a guarantor will arise, would depend purely on the terms of the contract**." (Emphasis added).

But if a guarantee is a continuing guarantee, does it mean it is an indefinite one? Put differently, when then would a cause of action arise against an issuer of a continuing guarantee so as to invoke the limitation of time?

In the present case at hand, and as Clause 2.01 of the Contract of Guarantee specifically indicates, the Guarantor did irrevocably, absolutely and unconditionally guarantee, **as "primary obligor",** to pay all payments in connection with the Lease Facility as the same shall become due and payable by the Company to Plaintiff, **upon default and receipt by the Guarantor of EADB's Demand**. In other words, once there is a default by the primary debtors and a demand notice is received by the Guarantor, the Guarantor will be liable to pay from the date of that demand.

Nonetheless, it is worth noting, however, that, despite the use of the wording such as "**primary obligor**", in essence, a contract of the surety is a collateral contract, not a direct one. Here, the Guarantor had assumed a primary obligation, but it was an obligation to pay the amount that was due under the lease agreement between the Plaintiff and the Company. In **Carey Added Value SL vs. Grupo Urvasco SA** [2010] EWHC

1905 (Comm), for instance, Blair, J., was of the view that, the "primary obligor" wording does not necessarily alter that conclusion.

In **Bradford Old Bank Ltd vs. Sutcliffe** (1918) 2 KB 833, (also referred to in the **Syndicate Bank's case** (supra), it was noted that, in a case where the guarantee is payable on demand, a demand was necessary to complete a cause of action and set the limitation statute in motion. In such a circumstance, therefore, the demand notice becomes a condition precedent to suing the surety, and, so, time does not begin to run till such demand has been made and not complied with.

Put differently, the limitation of time will only set in from when the demand is made and the guarantor commits breach by not complying with the demand. This was well captured in the **Syndicate Bank's Case** (supra) where the Court was of the view that:

> "In this case, the contract was broken and the right to sue accrued **only when a demand for payment was made by the Bank and it was refused by the guarantors**. When a

> demand is made requiring payment within a stipulated period, say 15 days, the breach occurs or right to sue accrues, if payment is not made or is refused within 15 days. **If while making the demand for** payment**, no period is stipulated within which the payment should be made, <u>the breach occurs or right to sue accrues</u>, when the demand is served on the guarantor**." (Emphasis added).

It is also worth noting, as it was stated in another Indian Gujarat High Court case of **Appearance vs Relying,** [19 July, 2012] that:

> "When the demand is made by the creditor on the guarantor, under a guarantee which requires a demand as a condition precedent for the liability of the guarantor, such demand should be for payment of a sum which is legally due and recoverable from the

principal debtor. **If the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise.** When the demand is made against the guarantor, **if the claim is a live claim (that is, a claim which is not barred) against the principal debtor**, **limitation in respect of the guarantor will run from the date of such demand and refusal/ noncompliance**. Where guarantor becomes liable in pursuance of **a demand validly made in time, the creditor can sue the guarantor** within [prescribed] years even if the claim against the principal debtor gets subsequently time-barred. To clarify … the following illustration may be

useful: "Let us say that a creditor makes some advances to a borrower between 10-4-1991 and 1-6-1991 and the repayment thereof is guaranteed by the guarantor undertaking to pay on demand by the creditor, under a continuing guarantee dated 1-4-1991. Let us further say a demand is made by the creditor against the guarantor for payment on 1-3-1993. Though the limitation against the principal debtor may expire on 1-6-1994, as the demand was made on 1-3-1993 when the claim was 'live' against the principal debtor, the limitation as against the guarantor would be …. from 1-3-1993. On the other hand, if the creditor does not make a demand at all against the guarantor till 1-6-1994 when the claims against the principal debtor get time-barred, any demand against the guarantor made

> thereafter say on 15-9-1994 would not be valid or enforceable." (*Emphasis added*).

From the above understanding, the question that follows in respect of the suit at hand is whether the demand was made by the Plaintiff and whether it was still **'live'** or otherwise, at the time it was made and, further, whether as of the date when the suit was filed, it was time barred.

Looking at the pleadings, there is no doubt that, there was default on the part of the Company and a demand notice was placed before the Defendant (Guarantor) by the Plaintiff on the 19th February 2013, as per **Annexure EADB-6** and **EADB- 9**.

Besides, it is also clear that the lease agreements (**Annexure EADB-1 & 2**) were valid for 60 months effective from the date of delivery of the Equipment by Lessor to the Lessee which delivery, as per **Annexure EADB-3** and **EADB-4** was done in June 2004 and August 2005.

That fact would mean that, by August 2011, the full amount payable under the lease agreements ought to have been made payable, and any failure in between the years 2004/2005 and 2010/2011, would, if so established, constitute a breach.

The Plaintiff, has alleged, however, that there were breaches and, that, the first demand notice (**Annexure EADB-6**) was raised upon the Guarantor on the 04th of February 2010 and the second demand notice (**Annexure EADB-9**) was served upon her on the 19th February 2013. The question to follow, therefore, is: were those demand notices raised in within the prescribed time?

In my view, the answer to the above question is definitely in the affirmative because, as stated herein above, **if the claim is a "live" claim (that is, a claim which is not barred) against the principal debtor**, **limitation in respect of the guarantor will run <u>from the date of such demand and refusal/ noncompliance</u>**.

It is worth noting that, in our law, all suits founded on contract not otherwise specifically provided for has a limitation of time pegged at six years from the time when the cause of action accrued. This means, therefore, that, if this suit was filed within six years **<u>from the date when the demand</u>** <u>was made</u> **<u>and noncompliance thereto ensued,</u>** that suit would have, therefore, be well within time.

Taking the cue from the above discussion, and since the demand notices were validly raised in time and were, thus, not time barred when raised, the question which follows is whether the present suit was filed within the prescribed time limit of six years as per Item 7 of Schedule I to the Law of Limitation Act, Cap.89 R.E 2019.

As a matter of fact, the claims against default by the Principal Debtor (the Company) and thus, against the Guarantor as well, taking into account that the liability of the guarantor co-exist with that of the principal debtor, were to expire by February, 2017 and/or February 2019, if one counts the six years period from the date when the demand notices declaring the breached were raised.

As I stated earlier herein, however, the suit at hand which is made against the Guarantor was instituted on the 04th day of April, 2022, which is some nine (9) years (plus) from the time when the Demand was last made on the 19th February, 2013, and four (4) and/ or three (3) years after the claims against the Principal Debtor got time-barred.

By all standards, therefore, and taking into account what may be persuasively gathered from the Indian case of

Appearance vs. Relying (supra), the filing of this case was indeed done outside the prescribed time limit under the Law of Limitation Act, Cap.89 R.E 2019.

In his submission, Mr. Mnyele has contended that, by relying on the **Annexure EADB-10**, which is a response to **Annexure EADB-9**, that, by implication, the Guarantor has not refused to pay. He contended that, that annexure was the Defendant's response to the effect that the Company was still committed to pay. In Mr. Mnyele's view, the implication of **Annex.EADB-10** is that, the guarantor has not refused to pay the bank and, therefore, his reliance on **Margaret Lalita Samuel's case (supra)**.

However, I do not agree with Mr. Mnyele that, **Annexure EADB -10** is a Commitment by the Guarantor, the Defendant to pay. The letter is not that of the Guarantor and there being no such a letter, her silence following the served notice upon her on the 19th February 2013 meant that, she refused to pay and the cause of action accrued there and then, which means time began to run right from that time and up to 19th February 2019, the six years expired.

In the case of **Brookside Dairy Tanzania Ltd vs. Liberty International Ltd and Another**, Commercial Case No.42 of 2020, HC Comm. (unreported), this Court, citing it earlier judgment in **John Cornel vs. A. Grevo (T) Ltd,** Civil Case No.70 of 1998 (HC) (unreported), stated that:

> "the law of Limitation of actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all who get caught in its web."

From the above legal proposition concerning the law of limitation of action, it follows that, the consequences of bringing a suit outside the prescribed period of time within which it could be filed and, without their being a leave to bring it out of time, will definitely visit such a suit.

In our circumstance, section 3 (1) of the Law of Limitation Act provides for such a consequence. It states that:

> "Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite

thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence."

In the upshot of the above, having made a finding that this suit was brought outside the prescribed time, this Court settles for the following order, that:

The present suit having been preferred belatedly out of time, is hereby dismissed with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 26TH DAY OF OCTOBER 2022

.....

DEO JOHN NANGELA

JUDGE